

Ropers Majeski Kohn & Bentley  
A Professional Corporation  
Redwood City

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Attorneys for Defendant  
LIBERTY LIFE ASSURANCE COMPANY OF BOSTON

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JANE PENCE,

Plaintiff,

v.

LIBERTY LIFE ASSURANCE COMPANY  
OF BOSTON, AMGEN, INC. LONG TERM  
DISABILITY PLAN,

Defendants.

Case No. C07-03451 MJJ

**STIPULATION AND [PROPOSED]  
ORDER GRANTING LIBERTY LIFE  
ASSURANCE COMPANY OF BOSTON  
LEAVE TO FILE AN AMENDED  
ANSWER**

It is hereby stipulated by and between the parties through their respective counsel of record that defendant Liberty Life Assurance Company of Boston may file a First Amended Answer to include an affirmative defense based on the Statute of Limitations and contractual limitations period contained in the policy. Plaintiff is not waiving her right to contest the validity or the viability of the affirmative defense by agreeing to this stipulation. A copy of the proposed Amended Answer is Attached hereto as Exhibit A.

Ropers Majeski Kohn & Benuvey  
A Professional Corporation  
Redwood City

1 Dated:

10/4, 2007

ROPER, MAJESKI, KOHN & BENTLEY

By:

PAMELA E. COGAN  
KATHRYN C. CURRY  
JOANN BABIAK

Attorneys for Defendant

LIBERTY LIFE ASSURANCE COMPANY  
OF BOSTON

2  
3  
4  
5  
6  
7 Dated:

10/4  
September, 2007

LAW OFFICES OF LAURENCE F. PADWAY

By:

LAURENCE F. PADWAY  
Attorneys for Plaintiff  
JANE PENCE

ORDER

14  
15 IT IS SO ORDERED. Liberty Life Assurance Company of Boston is hereby granted  
16 leave to file an amended Answer.

17  
18  
19 Dated:

HONORABLE MARTIN J. JENKINS

## **EXHIBIT “A”**

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LIBERTY LIFE ASSURANCE COMPANY OF  
BOSTON

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JANE PENCE,

Plaintiff,

v.

LIBERTY LIFE ASSURANCE  
COMPANY OF BOSTON,

Defendants.

CASE NO. C 07-03451 MJJ

**DEFENDANT LIBERTY LIFE ASSURANCE  
COMPANY OF BOSTON'S AMENDED  
ANSWER TO THE COMPLAINT OF  
PLAINTIFF JANE PENCE**

Defendant LIBERTY LIFE ASSURANCE COMPANY OF BOSTON ("Liberty Life") in answer to the Complaint of plaintiff JANE PENCE ("Plaintiff") on file herein, and to each and every cause of action contained therein, admits, denies and alleges as follows:

1. Answering the allegations contained in paragraph 1 of the Complaint, this answering defendant admits federal jurisdiction arises under 28 U.S.C. 1332(a).
2. Answering the allegations contained in paragraph 2 of the Complaint, this answering defendant admits plaintiff was a beneficiary of the group disability insurance plan for the University of California and that it is a governmental plan not subject to the Employee Retirement Income Security Act of 1974. As to the remaining allegations contained in paragraph 2 of the Complaint, this answering defendant denies the allegations therein.

1 3. Answering the allegations contained in paragraph 3 of the Complaint, misidentified  
2 therein as paragraph 4, this answering defendant admits the allegations contained therein.

3 4. Answering the allegations contained in paragraph 4 of the Complaint, misidentified  
4 therein as paragraph 5, this answering defendant admits Liberty Life issued a group disability  
5 insurance policy to the University of California, which contains long term disability insurance  
6 coverage for certain employees. As to the remaining allegations contained in paragraph 4 of the  
7 Complaint, this answering defendant denies the allegations contained therein as an inaccurate and  
8 incomplete summary of the plan documents, which speak for themselves.

9 5. Answering the allegations contained in paragraph 5 of the Complaint, misidentified  
10 therein as paragraph 6, this answering defendant admits plaintiff stopped work on December 12,  
11 2003 and denies the remaining allegations contained therein.

12 6. Answering the allegations contained in paragraph 6 of the Complaint, misidentified  
13 therein as paragraph 7, this answering defendant admits that plaintiff applied for short term and  
14 supplemental disability in August 2004. Further, this answering defendant admits it terminated  
15 disability benefits and that the decision was upheld on appeal. This answering defendant denies  
16 the remaining allegations therein as an inaccurate and incomplete summary of the policy, which  
17 speaks for itself.

18 7. Answering the allegations contained in paragraph 7 of the Complaint, misidentified  
19 therein as paragraph 8, this answering defendant denies each and every allegation contained  
20 therein.

21 8. Answering the allegations contained in paragraph 8 of the Complaint, misidentified  
22 therein as paragraph 9, this answering defendant incorporates by reference herein each of its  
23 admissions, denials and allegations contained in its responses to paragraphs 1 through 7 of the  
24 Complaint as though fully set forth herein.

25 9. Answering the allegations contained in paragraph 9 of the Complaint, misidentified  
26 therein as paragraph 10, this answering defendant admits that it issued a group disability  
27 insurance policy to the University of California, and that plaintiff was a covered person under the  
28 plan. As to the remaining allegations contained in paragraph 9 of the Complaint, this answering

1 defendant denies the allegations contained therein.

2 10. Answering the allegations contained in paragraph 10 of the Complaint, misidentified  
3 therein as paragraph 11, this answering defendant denies each and every one of the allegations  
4 contained therein.

5 11. Answering the allegations contained in paragraph 11 of the Complaint, misidentified  
6 therein as paragraph 12, this answering defendant denies each allegation contained therein.

7 12. Answering the allegations contained in paragraph 12 of the Complaint, misidentified  
8 therein as paragraph 13, this answering defendant denies the allegations contained therein.

9 13. Answering the allegations contained in paragraph 13 of the Complaint, misidentified  
10 therein as paragraph 12, this answering defendant denies each allegation contained therein.

11 14. Answering the allegations contained in paragraph 14 of the Complaint, misidentified  
12 therein as paragraph 15, this answering defendant denies each allegation contained therein.

13 15. Answering the allegations contained in paragraph 15 of the Complaint, misidentified  
14 therein as paragraph 16, this answering defendant denies each allegation contained therein.

15 16. Answering the allegations contained in paragraph 16 of the Complaint, misidentified  
16 therein as paragraph 17, this answering defendant denies each and every allegation contained  
17 therein.

18 17. Answering the allegations contained in paragraph 17 of the Complaint, misidentified  
19 therein as paragraph 18, this answering defendant denies the allegations contained therein.

20 18. Answering the allegations contained in paragraph 18 of the Complaint, misidentified  
21 therein as paragraph 19, this answering defendant denies each and every allegation contained  
22 therein.

23 19. Answering the allegations contained in paragraph 19 of the Complaint, misidentified  
24 therein as paragraph 20, this answering defendant denies the allegations contained therein.

25 20. Answering the allegations contained in paragraph 20 of the Complaint, misidentified  
26 therein as paragraph 21, this answering defendant denies the allegations contained therein.

27 21. Answering the allegations contained in paragraph 21 of the Complaint, misidentified  
28 therein as paragraph 22, this answering defendant denies the allegations contained therein.

22. Answering the allegations contained in paragraph 22 of the Complaint, misidentified therein as paragraph 23, this answering defendant denies each and every allegation contained therein.

23. Answering the allegations contained in paragraph 23 of the Complaint, misidentified therein as paragraph 24, this answering defendant denies each and every allegation contained therein.

24. Answering the allegations contained in paragraph 24 of the Complaint, misidentified therein as paragraph 25, this answering defendant denies each and every allegation contained therein.

25. Answering the allegations contained in paragraph 25 of the Complaint, misidentified therein as paragraph 26, this answering defendant denies the allegations contained therein.

#### **FIRST AFFIRMATIVE DEFENSE**

##### **(Failure to State a Claim)**

AS A FIRST, SEPARATE AND AFFIRMATIVE DEFENSE TO THE COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION CONTAINED THEREIN, this answering defendant alleges that said Complaint fails to state facts sufficient to constitute a cause of action.

#### **SECOND AFFIRMATIVE DEFENSE**

##### **(Conditions Precedent)**

AS A SECOND, SEPARATE AND AFFIRMATIVE DEFENSE TO THE COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION CONTAINED THEREIN, this answering defendant alleges that, at all times and places mentioned in the Complaint herein, plaintiff failed to perform certain conditions precedent to the duty of responding party. These conditions precedent were imposed upon plaintiff by contract. The non-performance of said condition excused responding party's obligations under the contract, and has given responding party the right of disaffirmance, rescission and release; plaintiff is thereby barred from recovery herein.



**THIRD AFFIRMATIVE DEFENSE****(No Coverage/Barred by Terms and Conditions)**

AS A THIRD, SEPARATE AND AFFIRMATIVE DEFENSE TO THE COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION CONTAINED THEREIN, this answering defendant alleges that the claims alleged against defendant, in whole or in part, do not fall within the scope of the coverage or are barred by the terms, conditions, definitions, exclusions, and the limitations contained in the group disability income policy issued by this answering defendant.

**FOURTH AFFIRMATIVE DEFENSE****(Failure to Mitigate)**

AS A FOURTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE COMPLAINT ON FILE HEREIN AND TO EACH ALLEGED CAUSE OF ACTION CONTAINED THEREIN, this answering defendant alleges that at all times and places mentioned in the complaint herein, plaintiff failed to mitigate the amount of her damages. The damages claimed by plaintiff could have been mitigated by due diligence on her part or by one acting under similar circumstances. Plaintiff's failure to mitigate is a bar to recovery under the complaint.

**FIFTH AFFIRMATIVE DEFENSE****(Waiver and Estoppel)**

AS A FIFTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE COMPLAINT ON FILE HEREIN AND TO EACH ALLEGED CAUSE OF ACTION CONTAINED THEREIN, this answering defendant alleges that plaintiff has waived and is estopped and barred from alleging the matters set forth in the complaint.

**SIXTH AFFIRMATIVE DEFENSE****(Excessive Fines)**

AS A SIXTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION CONTAINED THEREIN, this answering defendant alleges that plaintiff's complaint, to the extent that it seeks exemplary or punitive damages pursuant to Civil Code Section 3294, violates defendant's rights



1 to protection from “excessive fines” as provided in the Eighth Amendment of the United States  
 2 Constitution and Article I, Section 17 of the Constitution of the State of California, and violates  
 3 defendant’s rights to substantive due process as provided in the Fifth and Fourteenth  
 4 Amendments to the United States Constitution and the Constitution of the State of California, and  
 5 therefore fails to state a cause of action supporting the exemplary or punitive damages claimed.

#### 6 **SEVENTH AFFIRMATIVE DEFENSE**

##### 7 **(Substantive Due Process)**

8 AS A SEVENTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE  
 9 COMPLAINT ON FILE HEREIN AND TO EACH ALLEGED CAUSE OF ACTION  
 10 CONTAINED THEREIN, this answering defendant alleges on information and belief, and on that  
 11 basis alleges, that plaintiff’s complaint, and each cause of action stated therein, violates  
 12 defendant’s rights to substantive due process as provided in the Fifth and Fourteenth  
 13 Amendments of the United States Constitution and the Constitution of the State of California, and  
 14 therefore fails to state a cause of action supporting the exemplary or punitive damages claimed.

#### 15 **EIGHTH AFFIRMATIVE DEFENSE**

##### 16 **(Procedural Due Process)**

17 AS AN EIGHTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE  
 18 COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION  
 19 CONTAINED THEREIN, this answering defendant alleges that plaintiff’s complaint, to the  
 20 extent it seeks exemplary or punitive damages pursuant to Civil Code Section 3294, violates  
 21 defendant’s right to procedural due process under the Fourteenth Amendment of the United States  
 22 Constitution and the Constitution of the State of California, and therefore fails to state a cause of  
 23 action upon which either exemplary or punitive damages can be awarded.

#### 24 **NINTH AFFIRMATIVE DEFENSE**

##### 25 **(Set Off)**

26 AS A NINTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE COMPLAINT  
 27 ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION CONTAINED  
 28 THEREIN, Plaintiff’s recovery, if any, against the defendants must be off-set by all amounts of

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overpayment of benefits to plaintiff and any interest owed thereon and by any other amounts appropriate for set-off.

**TENTH AFFIRMATIVE DEFENSE**

**(Unclean Hands)**

AS A TENTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE COMPLAINT ON FILE HEREIN AND TO EACH ALLEGED CAUSE OF ACTION CONTAINED THEREIN, this answering defendant alleges that said complaint is barred by the Doctrine of Unclean Hands.

**ELEVENTH AFFIRMATIVE DEFENSE**

**(Statute of Limitations/Contractual Limitations Period)**

AS AN ELEVENTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION CONTAINED THEREIN, this answering defendant alleges that the action is barred by the applicable statute of limitations period and/or the contractual limitations period contained in the policy as authorized by the California Insurance Code.

**WHEREFORE**, this answering defendant prays for judgment as follows:

1. That plaintiff takes nothing by her complaint;
2. For costs of suit incurred herein; and
3. For such other and further relief as the Court deems just and proper.

Dated: October \_\_, 2007

ROPERS, MAJESKI, KOHN & BENTLEY

By: \_\_\_\_\_

PAMELA E. COGAN  
KATHRYN C. CURRY  
JOANN BABIAK  
Attorneys for Defendant LIBERTY LIFE  
ASSURANCE COMPANY OF BOSTON